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U.S. SENATOR

FOR IMMEDIATE RELEASE
Monday, January 30, 2006

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CHAFEE STATEMENT ON JUDGE ALITO NOMINATION

PROVIDENCE, RI -- Judge Alito has outstanding legal credentials and an inspiring life story. However, I am greatly concerned about his philosophy on some important constitutional issues. In particular I carefully examined his record on Executive Power, women's reproductive freedoms and the commerce clause of Article one, Section Eight of the Constitution.

On Executive Power, it is likely that cases dealing with the Fourth Amendment will be heard by the Supreme Court. The Fourth Amendment reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

To me this language is very clear that a warrant is required for a search. That premise is now being questioned regarding warrantless wiretaps.

At the Judiciary Committee hearings, Judge Alito was asked a question on Executive powers and warrantless wiretapping. He said he would have to determine “whether the President's power, inherent powers, the powers given to the President under Article II are sufficient, even taking away congressional authorization, the area where the President is asserting a power to do something in the face of explicit congressional determination to the contrary”.

The only power in Article II that Judge Alito could be referring to would be “The President shall be Commander in Chief of the Army and Navy of the United States...”.

Judge Alito was also asked "...is it possible under your construct that an inherent Constitutional power of the President could, under some analysis or some case, override what people believe to be a Constitutional criminal statute?" Judge Alito responded that this was possible noting a "possibility that that might be justified".

How far do we want Commander in Chief stretched? As Justice O'Connor wrote in a recent case, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens".

On the issue of Roe vs. Wade as with other issues, I am less interested in what Judge Alito wrote or said as a lawyer for his client the Reagan Administration, than how he has ruled as a judge and how he testified at his nomination hearing. As an appellate Court Judge, Judge Alito was the lone dissenter on Planned Parenthood vs. Casey, a court case reviewing the Pennsylvania Abortion Control Act.

The Supreme Court wrote on this landmark affirmation of Roe vs. Wade:

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state".

The five majority justices, who wrote that, were all Republican appointees: two Reagan appointees, one each of Bush "41", Ford and Nixon.

An important standard of law is the concept of stare decisis--it stands decided. At the hearing Chairman Specter asked Judge Alito to discuss his view of stare decisis. He responded, "It's not an inexorable command, but it is a general presumption that courts are going to follow prior precedents". In the Supreme Court dissent on Casey, the justices who arguably wanted to overturn Roe vs. Wade wrote "stare decisis is not a universal inexorable command".

Not only did Judge Alito rule in favor of the Pennsylvania Abortion Control Act as a lower court judge, he used the same language as the high court dissenters at his Supreme Court nomination hearing. Stare decisis is not an inexorable command.

Additionally, at his nomination hearing Judge Roberts was willing to call Roe vs. Wade "settled law" but judge Alito refused to make a similar statement.

The last point I'd like to make concerning constitutional law is on the commerce clause. As you know the Constitution creates a government of limited power--Congress can only enact legislation in areas that are specifically set out under the Constitution. Congress is expressly prohibited from enacting legislation in other areas, leaving this authority to the

States per the Tenth Amendment: “The powers not delegated to the United States by the Constitution...are reserved to the States respectively, or to the people”.

Every law enacted by Congress must be based on one of the powers enumerated in the Constitution. The Framers of the Constitution gave Congress broad power to regulate immigration, national security and economic activity between the states, and left most other power with the States.

However, Section Eight of Article I states that “the Congress shall have the power to regulate Commerce...among the several states”. This is the Commerce clause and it is the most powerful provision in the Constitution providing Congress the authority to enact legislation in a host of areas – including environmental protection. A key Supreme Court case regarding the Commerce Clause was in 1942 when the Supreme Court upheld legislation that allowed USDA to set quotas on local wheat growing. The Court noted that while crops regulated may never actually enter into interstate commerce, such local activity, coupled with similar activity in other states as an aggregate has a direct impact on interstate commerce. Since then using the “aggregate effects test” or “substantial effects test” Congress has passed broad ranging environmental legislation such as the Clean Air Act, Clean Water Act and the Endangered Species Act, all of which were signed into law by Republican President Nixon.

While I agree there should be constitutional limits on legislative power, Judge Alito seems to have agreed with Justice Thomas who wrote: “I believe we must further reconsider our substantial effects test with an eye toward constructing a stand that reflects the text and history of the Commerce Clause”.

Indeed in a dissent to a gun case heard before his court Judge Alito wrote:

“In sum, we are left with no appreciable empirical support for the proposition that the purely intrastate possessions of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce, and without such support I do not see how the statutory provision at issue here can be sustained”.

What is noteworthy in this dissent is that Judge Alito was alone with all members of his Appeals Court ruling the other way.

If “the aggregate or substantial effects tests” are overruled as Justice Thomas has advocated, federal environmental laws could be ruled unconstitutional. Indeed on February 21, the Court is scheduled to hear arguments on two cases, Carabell vs. United States and United States vs. Rapanos.

In both cases the lower court upheld protection of wetlands, which are currently protected under the Clean Water Act. Environmentalists argue that these wetlands are critical to the health of our nation’s water supply and wildlife habitat.

Industry groups argue that the Army Corps of Engineers has no authority under the Clean Water Act to regulate “isolated wetlands” that have no connection with “navigable waters.” This would be a major setback to the Clean Water Act.

The critical issue is whether under the Commerce Clause, Congress has the authority to regulate non-navigable bodies of water within a single state. Based on the writing of Judge Alito, he would appear to side with the faction what would greatly limit the ability of Congress to protect such “intrastate” issues.

These constitutional issues, the scope of Executive power, Women’s Reproductive freedoms and the commerce clause are likely to be heard by the Supreme Court in the coming months. I care deeply about these issues.

Believe me, having been an Executive in government, I want to support President Bush’s choice to the Supreme Court. The President did win the election. He has made his promises and I have made mine.

I am a pro-choice, pro-environment, pro-Bill of Rights Republican and I will be voting against this nomination.

Thank you again for your time.

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